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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-348

B. V. CLEMONS, L.P.T., *et. al., Appellants,*

vs.

UNITED STATES OF AMERICA, *et. al., Appellees.*

On Appeal From The United States District Court
For The Southern District of Ohio
Eastern Division

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

The Appellants, pursuant to the United States Supreme Court Rules 13 (2) and 15, file this, their statement of the basis upon which it is contended that the Supreme Court of the United States has jurisdiction on a direct appeal from a Three-Judge District Court to review the Final Order dismissing Appellants' complaint, and should exercise such jurisdiction in this case.

I. OPINION BELOW

The opinion of the Three-Judge District Court for the Southern District of Ohio, Eastern Division is not yet reported. The order and the opinion of the Court are set forth in Appendix A hereto.

II. JURISDICTION

The appeal herein is from a final decision made and entered by a United States District Court for the Southern District of Ohio, Eastern Division, specially constituted under 28 U.S.C. §§2282 and 2284 upon the plaintiff's application for declarative relief and an interlocutory and permanent injunction to restrain the enforcement, operation and implementation of an Act of Congress, to wit, Section 251(c) of the Social Security Amendments of 1972, 81 Stat. 851, 42 U.S.C. §1395x (v) (5) (A), for repugnance to the due process clause of the Fifth Amendment of the Constitution of the United States of America. The judgment of the Court was entered on March 26, 1975, and Notice of Appeal was filed in that Court on May 23, 1975. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code, Section 1253.

III. QUESTIONS PRESENTED

Professional physical therapists spend a significant number of years becoming educated, trained, and experienced so as to be able to render professional services on a level generally consistent with the professions of the other healing arts. Qualifications for persons who wish to become or practice physical therapy are regulated by law. In Ohio the qualifications and practice requirements are set forth in Chapters 4731 and 1785 of the Ohio Revised Code.

No corporation (including hospitals, skilled nursing homes and home health agencies) can become licensed to

promote, practice or render physical therapy to the public under Ohio law, except professional corporations comprised of physical therapists associating together, and such therapy should be performed in a non-professional corporation by a licensed therapist under a contractural arrangement as an independent contractor. Section 1701.03, 1785.01 (A) (B), 1785.03, 4731.70 (A) and 4731.73 (A) Ohio Revised Code. Many physical therapists are employed on a salary basis in corporations, (as are many physicians) and may render service to employees therein but are not permitted to hold out and perform professional services as an employee of a non-professional corporation to the public-at-large. In this way, Ohio prevents corporations from practicing a profession and profiting from the potential exercise of unethical conduct and methods.

Until 1972, physical therapists practicing as permitted by Ohio law in associations and rendering their services under contractural arrangements with institutional health related entities (which comprise over eighty-five percent of the demand for therapy services), were indirectly compensated under Medicare by a method relating unit of service to actual cost. In October, 1972, Congress passed a law creating a new method to reimburse health entities ("providers") for physical therapy services. This formula, called "salary equivalency" essentially limits provider reimbursement to what Medicare defines as "reasonable costs": that amount equal to what the provider could pay a "salaried therapist" to perform the same work done by the "contracting therapist" (regardless of the actual cost incurred by the provider in so doing). This new law ex-

pressly would not apply to those professionals included in the Medicare definition of "physician" but did include all therapists, professional social service workers and allied medical service workers. All of the persons included in the coverage of the law, except the physical therapist, could become (and usually are) employees of a provider and thereby would not be practicing a profession in violation of Ohio law. Since providers in Ohio cannot employ a physical therapist and hold out his service to the public for renumeration, the law in question creates an artificial and arbitrary classification among physical therapists that actually reduce and eliminate the amount of therapy service to Medicare beneficiaries in provider settings.

In the above context presented for review are the following questions:

1. Whether a federal law admittedly providing for unequal treatment within the same class of medical professionals must be declared unlawful, and its implementation enjoined;

   a. Because it is not rationally related to a legitimate governmental interest.

   b. Because it violates the express mandate of Medicare law prohibiting governmental control or supervision over the operation of a provider or person providing health services.

   c. Because in its application the provider would be placed in direct violation of state laws prohibiting

the unauthorized practice of physical therapy, and the licensed professional would be in violation of his license to practice.

2. Whether Appellants are denied equal protection of the laws guaranteed by the Fifth Amendment by the implementation of "salary equivalency" which operates as a major impingement upon the viability of licensed physical therapists to associate and practice their profession.

IV. STATUTES INVOLVED

Section 1395 x (v) (5) (A), the constitutionality of which is challenged by Appellants provides:

> "Where physical therapy services . . . are furnished under an arrangement with a provider of services or other oganization, . . . the amount included in any payment to such provider or other organization . . . as the reasonable costs of such services . . . shall not exceed an amount equal to the salary which would reasonably have been paid for such services (together with any additional costs that would have been incurred by the provider or other organization) to the person performing them if they had been performed in an employment relationship with such provider or other organization plus the cost of such other expenses (including a reasonable allowance for travel-time and other reasonable types of expense related to any differences in acceptable methods of organization for the provision of such therapy) incurred by such person."

Various sections of the Medicare Act (technically the Health Insurance for the Aged Act, 42 U.S.C. §§1395 et seq.), the Fifth Amendment to the Constitution of the United States of America, and sections of Chapter 4731 and 1785 of the Ohio Revised Code are also involved herein and are set forth in Appendix B.

V. STATEMENT OF THE CASE

A. The Medicare Act

The Medicare Act ("Act") "provides basic protection against the costs of hospital and related post-hospital services . . . for individuals who are age 65 or over" and are entitled to benefits. 42 U.S.C. §1395 (c). Beneficiaries are entitled to receive services covered by the Act from hospitals, extended care facilities, or home health agencies qualified to participate in the program. Such institutions are called "providers of services" or "providers". 42 U.S.C. §1395x (u). The Act provides coverage for physical therapy services rendered to a beneficiary at a providers facility.

B. Appellants

Appellant Clemons and others are licensed physical therapists who render professional services as required by their regulatory practice statutes. All Appellants service providers as defined in the Act, and all deliver their service in largely rural areas where their services are frequently the only therapy service in the county or tri-county area. Appellants have staffs of associate therapists and aides to render service, and have invested considerable money in

equipment, training, education and time in providing therapy service to areas not otherwise able to attract therapists.

After passage of the "salary equivalency" law and the publishing of the proposed regulations thereto, providers began cancelling their service contracts, and began requesting Appellants to become salaried therapists (in violation of Ohio professional practices law) because the new method of provider reimbursement allowed them to continue to be reimbursed fully by Medicare on a "reasonable cost" basis only if the Appellants were in the different statutory classification of therapist.

Rather than disband their associations or risk the loss of licensure for aiding unauthorized practice of physical therapy, Appellants filed their lawsuit on December 28, 1973 in the District Court to challenge the constitutionality of the arbitrary and capricious statute, and for declarative and injunctive relief.

C. Summary of This Litigation

1. and 2. Appellants Action and Jurisdiction of the District Court

Jurisdiction of Appellants' action in the District Court was founded upon 28 U.S.C. §§1331 and 2201, venue upon 28 U.S.C. §1391(e). On July 3, 1974, Appellants filed their motion for the convening of a three-judge district court and a motion for temporary restraining order and preliminary injunction. A Three-Judge District Court was designated in accordance with 28 U.S.C. §2284 on

August 19, 1974. Appellants moved for summary judgment on September 25, 1974. On the pleadings, the District Court filed its opinion and order granting summary judgment for Appellees and dismissing the complaint on March 26, 1975.

3. Decision Below

The District Court, in granting the Appellees summary judgment, held in a decision with one dissent that, despite the admitted discrimination against the Appellants, the "salary equivalency" regulation in question was constitutional as reaching a legitimate governmental purpose. The dissenting judge stated that the record before the Court did not present sufficient evidence to sustain a rational relationship between the salary equivalency regulation in question and a legitimate governmental interest, and that genuine issues of fact existed as to whether the statute was constitutional in its application to Appellants.

VI. REASONS FOR THIS COURT GRANTING JURISDICTION.

A. Existence of Conflict of Decisions Between Lower Courts on Important Questions of Federal Law Which Have Not Been, but Should be Settled by the Supreme Court.

Because of the novel and far reaching significance of regulations and statutes implemented by the Department of Health, Education and Welfare relating to amendments to the Social Security Act, court decisions on similar and identical issues in this case have been decided recently in conflict with other lower courts, and with precedents long ago approved by this Court. For this reason and others presented herein, important questions and issues relating

to the right of medical professionals to be free from invidious, capricious and arbitrary congressional classifications which do not have for their basis either a compelling governmental interest or a legitimate rational basis must be resolved by this Court.

It is said that hard cases make bad law. So, perhaps, may deceptively simple cases, in which the appearance of simplicity is contributed to by a lower court decision which proceeds upon incorrect, unexpressed premises and which treats the issues of the cause *simpliciter*. Such, Appellants respectively submit, is this case, because of the failure of the lower court to consider the fundamental rights of Appellants affected by this law, a premise which is manifestly a false start which when pursued necessitates fallacious conclusions.

The issues and questions involved in this appeal have important national significance and affect millions of Americans dependent upon therapy services from the Medicare program. Several cases with identical facts and issues are pending in lower courts and courts of appeals and will ultimately be presented to this Court for resolution and clarification of the same constitutional standards and precedents requested to be determined by this Court in this appeal.

Rather than present a full argument here, which would be more appropriately presented by the briefs or on argument, Appellants submit that the recent decisions in the following cases create great doubt and conflict as to the consitutional standard and precedents to be applied to assess the right to associate together for business and the right

to contract or practice one's profession when these rights come in conflict with an Act of Congress; *Association of American Physicians and Surgeons v. Weinberger,* U. S. District Court Northern District of Illinois, Eastern Division. Civil No. 73-C-1653 (decided May 8, 1975 before a three-judge court) *American Medical Association v. Weinberger,* U. S. District Court Northern District of Illinois, Eastern Division. Civil No. 75-C-560 (decided June 5, 1975) *Johnson's Professional Nursing Home v. Weinberger,* (1974) 490 F. 2d 841. *Physical Therapy Services Rehabilitation Agency v. Weinberger,* U.S. District Court, District of Columbia, Civil No. 74-897 (decided July 18, 1975).

In view of the precedents relied upon in the decision of the Three-Judge District Court below and the subsequent decisions on identical issues by other courts interpreting the same legal precedents (with particular reference to economic social welfare legislation) the constitutional standards to be applied and the appropriateness of the precedents are now in need of review and clarification by this Court.

B. The Conclusions or Facts Found by the District Court Supporting Its Decision Were Contrary to the Allegations of Appellants Complaint, Were Sharply Refuted by Appellees' Concessions and Appellants' Supporting Documentation and So Far Departs From the Accepted and Usual Course of Judicial Proceedings as to Call for an Exercise of the Supreme Court's Power of Supervision.

The Three-Judge District Court in dismissing Appell-

ants' complaint as being without merits necessarily rejected the uncontroverted facts supplied in the pleadings, affiidavits and documents submitted by various therapists, and the admission by the defendant that the law in question does create disparate treatment among those in the same classification created by "salary equivalency." If one treats the Court's decision as a dismissal of the complaint for failure to state a claim, then the "allegations of the complaint and supporting affidavits [must be accepted] as true" *Gardner v. Toilet Goods Association,* 387 U.S. 167, 172 (1967). Assertions of fact inconsistent with allegations in the complaint must be disregarded. The Court below ignores this established principle of judicial construction.

If on the other hand, the Court's decision is treated as a grant of summary judgment to defendants, its action is clearly unjustified. In that event, if material facts are genuinely at issue, the motion for summary judgment must be denied — "factual issues are not to be tried or resolved by summary judgment procedure." *Elgin, J. & E. Ry. Co. v. Burley,* 325 U.S. 711, 719 (1945), *Bohn Aluminum & Brass Corp. v. Storm King Corp.* (CA 6th, 1962), 303 F. 2d, 425, 427. The conclusions the Court reached were pointedly disputed by the parties below and is the significant reason why the decision of the Court was not unanimous. The conclusions of the Court below were amply refuted and significantly the government failed to demonstrate even a legitimate rational basis for the classification and discrimination in question to the purposes for the Medicare program.

The Court below, by assuming or accepting facts in the

government's favor has denied Appellants their opportunity to prove a case well pleaded and documented. In that respect its treatment of the factual issues is a perversion of the accepted and usual course of judicial proceedings. This calls for an exercise of the Supreme Court's power of supervision, in order to protect the integrity of the adjudicative process.

CONCLUSION

For the foregoing reasons, the Supreme Court should note probable jurisdiction and grant Appellants an opportunity to obtain judicial redress.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

B. V. CLEMONS, L.P.T., et al. :

Plaintiffs :

vs. Civil Action 73-530

UNITED STATES OF AMERICA, et al. :

Defendants :

OPINION

Before John W. Peck, Judge, United States Court of Appeals for the Sixth Circuit; Joseph P. Kinneary, Chief Judge United States District Court; and Robert M. Duncan, United States District Judge.

Kinneary, Chief Judge. Plaintiffs in this action seek declaratory and injunctive relief against a federal statute and regultions governing the payment of fees to physical therapists under the Medicare Act.

This matter is before the Court on the amended complaint and answer, the parties' cross motions for summary judgment, and affidavits filed in support of these motions. Alternatively, defendants have moved to dismiss.

The plaintiffs, licensed physical therapists, contend that enforcement of the challenged statute discriminates against their profession in a manner which denies them equal pro-

tection of the law. Defendants argue that a rational relationship exists between the statutory classification and legislative interest.

The Court renders judgment in favor of the defendant Caspar Weinberger and defendant Department of Health, Education and Welfare.

Plaintiffs are twelve independent, licensed physical therapists who are eligible to render services under the Medicare Act.

Defendant Caspar Weinberger is Secretary of the Department of Health, Education and Welfare which administers the Medicare Act.

The Medicare Act, 42 U.S.C. §1395, *et seq.*, is intended to provide "basic protection against the costs of hospital and related post-hospital services . . . for individuals who are age 65 or over" and are entitled to benefits under the Act. 42 U.S.C. §1395c. Medicare beneficiaries receive services from hospitals, extended care facilities and home health agencies which are qualified to participate in the program. These institutions are "providers of services", 42 U.S.C. §1359x (u), which are reimbursed by either the Secretary or certain private organizations (e.g., Prudential; Blue Cross; and Blue Shield) acting as fiscal intermediaries. Although plaintiff independent physical therapists render services to Medicare beneficiaries, they do not receive payment from the Secretary or the beneficiary because they do not qualify as "providers of services" under §1359x (u). Instead, they contract with "providers of services" to perform physical therapy for Medicare beneficiaries. The "provider of services" then pays the physical therapist for his services.

Congress has enacted Public Law 92-603, Section

251(c), which is codified at Title 42, United States Code, Section 1395x (v) (5) (A) to regulate fees paid physical therapists. This section provides that:

> Where physical therapy services . . . or other therapy services or services of other health-related personnel (other than physicians) are furnished under an arrangement with a provider of services or other organization, specified in the first sentence of subsection (p) of this section the amount included in any payment to such provider or other organization under this subchapter as the reasonable cost of such services (as furnished under such arrangements) shall not exceed an amount equal to the salary which would reasonably have been paid for such services (together with any additional costs that would have been incurred by the provider or other organization) to the person performing them if they had been performed in an employment relationship with such provider or other organization (rather than under such arrangement) plus [other expenses reasonably related to the therapy] as the Secretary may in regulations determine to be appropriate.

The Secretary has proposed regulations further defining the manner in which therapists will be paid.

Plaintiffs seek a declaration that the statute is unconstitutional, and injunctions against the enforcement of the statute and publishing of the regulations.

Plaintiffs move for summary judgment on the grounds that there is no genuine issue as to any material fact and that they are entitled to judgment as a matter of law. Defendants move for summary judgment on the grounds that

I

(1) plaintiffs lack standing; (2) venue is improper; (3) the Court lacks subject matter jurisdiction; and (4) the amended complaint fails to state a claim for which relief can be granted.

Defendants argue that plaintiffs do not have standing to challenge the Medicare Act because their interests are not within the zone of interests protected by the Act. *See, Schroeder Nursing Care, Inc.* v. *Mutual of Omaha Insurance Co.,* 311 F. Supp. 405, 409 (E.D. Wisc. 1970).

The preliminary inquiry in standing questions is whether there is a case and controversy between the parties. See. *DeFunis* v. *Odegaard,* 416 U.S. 312, 316 (1974). Plaintiffs, as independent, licensed physical therapists eligible to render services to beneficiaries under the Medicare program, are adversely affected by the limitation on their fees imposed by §1395x (v) (5) (A). The uncontroverted affidavit of plaintiff B. V. Clemons establishes that he renders services to "providers of services" under the Act, and that the amount of his fees will be adversely affected when §1395x (v) (5) (A) becomes effective.[1] Plaintiffs are not required to suffer actual loss before seeking declaratory and injunctive relief.

When a case or controversy exists, the Court must determine "whether the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise." If there is injury in fact, the Court must then decide "whether the interest sought to be protected by the com-

[1] Public Law 92-233, Section 17 postponed the effective date of §1395x (v) (5) (A) to the month in which final implementing regulations are promulgated by the Secretary. Proposed regulations were published May 28, 1974, 39 Fed. Reg. 18468-69.

plainant is arguably within the zone of interest to be protected or regulated by the statute or constitutional guarantee in question." *Data Processing Service* v. *Camp,* 397 U.S. 150, 152-153 (1970).

The complaint alleges an economic injury in fact. But the defendants argue that plaintiffs' interest — being paid for their services — is not within the zone of interests protected or regulated by the statute. The Medicare program attempts to protect its beneficiaries from the costs of hospital and related posthospital services. 42 U.S.C. §1395c. One element of this protection is the establishment of the maximum costs covered by Medicare.[2] This is, in effect, a regulation of the provider of services and those individuals who contract with providers to render services to Medicare beneficiaries. The interest plaintiffs seek to protect — their fees — is thus regulated by the Act to promote the purposes of the Medicare program. The Court concludes that plaintiffs have standing to sue. *Cf. New Jersey Chapter Inc. of the American Physical Therapy Association* v. *Prudential,* 502 F. 2d 500, 504 (D.C. Cir. 1974).

II

Defendants challenge venue. Title 28, United States Code, Section 1391 (e) provides:

> A civil action in which each defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, may except as otherwise provided by law, be brought in

[2] This regulation directly protects Medicare beneficiaries from inflated health care costs. It also is essential to the overall viability of the program, because the government must husband limited resources to provide the maximum protection to the largest number of needy persons.

> any judicial district in which: (1) a defendant in the action resides, or (2) the cause of action arose, or (3) any real property involved in the action is situated, or (4) the plaintiff resides if no real property is involved in the action.

No real property is involved in this action. Named plaintiff B. V. Clemons resides in the Southern Judicial District of Ohio. Thus, venue is proper. *Natural Resources Defense Council, Inc.* v. *TVA,* 340 F. Supp. 400, 405-406 (S.D. N.Y. 1971).

III

Plaintiffs assert jurisdiction under the provisions of Title 28, United States Code, Sections 1331 (a).[3] Defendants contend that the Court does not have subject matter jurisdiction because (1) the government has not consented to suit and (2) plaintiffs have not demonstrated the existence of the jurisdictiontional amount of $10,000 in controversy.

The Medicare Act does not provide for judicial review of the Act's constitutionality. However, the trend in the case law is to imply a cause of action arising by implication from the Constitution when a plaintiff alleges that the government has deprived him of a constitutional right. See, *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics,* 403 U.S. 388, 392, 395-297 (1971); *Jacobs* v. *United States,* 390 U.S. 13 (1933); *City of Kenosha* v. *Bruno,* 412 U.S. 507, 516 (1973) Brennan, J. concurring); *Dahl* v. *City of Palo Alto,* 372 F. Supp. 647, 649 (N.D. Calif. 1974); *James* v. *United States,* 358 F. Supp. 1381, 1386-1387 (D. R.I. 1973); *Cortright* v.

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[3] The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States. 28 U.S.C. §1331 (a).

Resor, 325 F. Supp. 797, 809-811 (E.D. N.Y.), *reversed on other grounds,* 447 F. 2d 245 (2d Cir. 1971), *cert. denied,* 405 U.S. 965 (1972). *But cf. Bivens,* 403 U.S. *supra* at 409; *Wahba* v. *New York University,* 492 F. 2d 96, 103 (2d Cir 1974); *Perzanowski* v. *Salvio,* 369 F. Supp. 223, 229-231 (D. Conn. 1974); *Smothers* v. *Columbia Broadcasting System, Inc.,* 351 F. Supp. 622, 626 n. 4 (C.D. Calif. 1972); *Davidson* v. *Kane,* 337 F. Supp. 922, 924-925 (E.D. Va. 1972). The government cannot without impugnity violate the basic charter of the land.

The amended complaint alleges generally that there is more than $10,000 in controversy. Plaintiff B. V. Clemons has executed an uncontroverted affidavit swearing that §1395x (v) (5) (A) will cause him to lose substantially more than $10,000 in income. Thus, plaintiffs do not, as defendants argue, aggregate their claims to meet the $10,000 jurisdictional amount.

The Court HOLDS that it has subject matter jurisdiction over plaintiffs' claims for relief.

IV

Plaintiffs assert that §1395x (v) (5) (A) arbitrarily deprives them of equal treatment under the law. Defendants contend that the legislative classification is rationally related to the legitimate governmental purpose of fiscal responsibility.

Plaintiffs view §1395x (v) (5) (A) as a price fixing control which is morally repugnant and constitutionally infirm. Plaintiffs ask in their brief: "why were physical therapists (whose charges amount to less than 1% of Medicare costs) *singled out* among other medical service groups as the target for special price-fixing restrictions?" Plaintiffs label §1395x (v) (5) (A) a hapazard and dis-

criminatory restriction on their income which has no logical justification. Plaintiffs baldly assert that "for some unexplaned reason, HEW wants to put independent physical therapists out of business." Plaintiffs also argue that §1395x (v) (5) (A) is not an economizing measure because it will not in fact result in a reduction of costs.

The Fifth Amendment due process clause incorporates the concept of equal protection and applies it to federal actions. *United States Department of Agriculure* v. *Moreno,* 413 U.S. 528 (1973). When a legislaive classification works to the disadvantage of a "suspect class", see, *Loving* v. *Virginia,* 388 U.S. 1, 11 (1967) (race); *McLaughlin* v. Florida 379 U.S. 184, 191-192 (1964) (race); *Bolling* v. *Sharpe,* 347 U.S. 497, 499 (1954) (race); *Graham* v. *Richardson,* 403 U.S. 365, 372 (1971) (alienage); *Oyama* v. *California,* 332 U.S. 633, 644-646 (1948) (national origin); *Korematsu* v. *United States,* 323 U.S. 214, 216 (1944); *Hirabayashi* v. *United States,* 320 U.S. 81, 100 (1943) (national origin) or interferes with the exercise of a "fundamental" right or liberty, see *Shapiro* v. *Thompson,* 394 U.S. 618, 629 (1963) (right to travel); *Dunn* v. *Blumstein,* 405 U.S. 330, 336 (1972) (right to vote); *Police Department of Chicago* v. *Mosley,* 408 U.S. 92, 101 (1972) (First Amendment rights); *Skinner* v. *Oklahoma,* 316 U.S. 535 (1942) (right of procreation), the Court must determine whether the discrimination was necessary to promote a compelling governmental interest. Plaintiffs assert that their right to practice a profession is fundamental, and any impairment of that right requires strict judicial scrutiny. This argument is wihout merit. Governmental regulation of professions is reviewed by the rational basis test, and not the compelling governmental interest test. *Sec. e.g., Williamson* v. *Lee Optical Co.,* 348 U.S. 483, 488-489 (1955). The rational basis test was

recently stated by the United States Supreme Court in *Weber* v. *Aetna Casualty & Surety Co.,* 406 U.S. 164, 172 (1972):

> The tests to determine the validity of state statutes under the Equal Protection Clause have been variously expressed, but this Court requires at a minimum that a statutory classification bear some rational relationship to a legitimate state purpose. *Morey* v. *Doud,* 354 U.S. 457 (1957); *Williamson* v. *Lee Optical Co.,* 348 U.S. 483 (1955); *Gulf, Colorado & Santa Fe R. Co.* v. *Ellis,* 165 U.S. 150 (1897); *Yick Wo* v. *Hopkins,* 118 U.S. 356 (1886).

A plaintiff bears a heavy burden of establishing the unconstitutionality of a statute:

> In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some "reasonable basis," it does not offend the Constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some inequality." *Lindsley* v. *Natural Carbonic Gas Co.,* 220 U.S. 61, 78. "The problems of government are practical ones and may justify, if they do not require, rough accommodations — illogical, it may be, and unscientific." *Metropolis Theatre Co.* v. *City of Chicago,* 228 U.S. 61, 69-70. "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *McGowan* v. *Marylan,* 366 U.S. 420, 426.

Dandridge v. *Williams,* 397 U.S. 471, 485 (1970). Section 1395x (v) (5) (A) was enacted to implement a legitimate governmental purpose.

Congress intended to control Medicare costs by limiting fees for physical therapy services when it enacted §1395x (v) (5) (A). See, H.R. Rep. No. 92-231, 92nd Cong., 2d Sess. (1972) reprinted in 1972 U.S. Code Cong. and Armin. News 4989, 5004, 5006, 5095-5096; Conf. R. No. 92-1605, 92d Cong., 2d Sess. (1972) reprinted in 1972 U.S. Code Cong. and Admin. News 5370, 5392. This governmental purpose of conserving limited resources to attain legislatively determined social and social and economic goals is constitutionally permissible. *See, Dandridge* v. *Williams,* 397 U.S. 471, 486-487 (1970); *New Jersey Chapter, Inc. of the American Physical Therapy Association* v. *Prudential,* 502 F. 2d at 505. The legislation is a good faith attempt to limit costs to reasonable fees for physical therapy services. This Court will not speculate about the possible success or failure of the statute in achieving its goal; although the Court notes that plaintiffs' argument that the legislation will not cut costs is attenuated.[4]

Plaintiffs' argument that similar limitations are not imposed on other providers of services is not borne out by an examination of the Medicare Act. A provider of services may only recover the lesser of the reasonable cost of his services or the customary charge for such services. 42 U.S.C. §1395f (b) (1). Even assuming differential treatment, the legislature is not required to solve all problems at once. It may legislate partial solutions, neglecting other equally important problems. *Williams* v. *Lee Optical Co.,*

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[4] In a confusing argument, plaintiffs state that hospitals and nursing homes may actually charge more for physical therapy services performed by institution employees than they do for such services when performed by independent physical therapists. Consequently, the costs may be greater if independent physical therapists are eliminated. This argument, though not plaintiffs', would seem to concede that they would not be economically disadvantaged by §1395x (v) (5) (A).

348 U.S. at 489; *Jefferson* v. *Hackney,* 406 U.S. 535 (1972). Congress was not constitutionally required to attempt to regulate all Medicare costs in the same manner.

The Court HOLDS that §1395x (v) (5) (A) is not violative of the Fifth Amendment to the Constitution of the United States.

WHEREUPON, the Court HOLDS that plaintiffs' motion for summary judgment is without merit, and therefore it is DENIED. The Court FURTHER HOLDS that defendants' motions to dismiss and for summary judgment are meritorious, and therefore they are GRANTED.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

B. V. CLEMONS, L.P.T., et al. :

Plaintiffs :

vs. Civil Action 73-530

UNITED STATES OF AMERICA, et al. :

Defendants :

OPINION

Duncan, Judge, dissenting. I must respectfully dissent. While I am in agreement with many of the principles enunciated by the majority, application of these principles to this case gives me pause. The briefs of the parties and the affidavits submitted in support of the cross-motions for summary judgment do not in my opinion adequately answer the questions raised by the enactment of the challenged salary equivalency scheme. Some generalizations perhaps are in order, and I will attempt to set them out below.

The primary inquiry in this case seems obscured by the prolixity of the briefs. Providers which employ in-house therapists can be reimbursed for physical therapy services performed so long as the charge is *reasonable.* See 42 U.S.C. §§1395cc, 1395x (v) (1) (A) and 1395 (1). Not so with respect to the "non-provider," independent physical therapists. The resolution of this case should therefore turn on whether or not there is a rational basis for the statutory esablishment of a "salary equivalency" ceiling for reimbursement of the plaintiff therapists when the statutory standard for medicare reimbursement of in-house therapy

services remains one of "reasonableness." Affording the statute its presumption of constitutionality, I am unable to ascertain the basis for this uneven treatment. There are no facts before us which would indicate a rationale for the continued statutory approval of a "reasonableness" ceiling for services performed in-house and the challenged statutory disapproval of a "reasonableness" standard for services performed by independents. Indeed, the only evidence of record which sheds light on the relative costs to the medicare system of independent *vis a vis* in-house therapy services is the affidavit of one of the plaintiffs, averring that charges for services by independents are in some instances less than those of in-house therapists.

I agree with the majority that it appears facially inconsistent for the plaintiffs to contend on the one hand that the impact of the contested legislaion will be financially devastating for them, and on the other that they are presently able to charge less for the same services than providers with in-house therapists. However, it may well be that current charges for in-house therapy services are based upon cost factors which include fairly low salaries for employee therapists and other costs which are substantially higher than those of a comparable independent therapist. Certain independents with large clienteles might, for example, experience economics of scale which are unavailable to providers which employ their own therapists. Thus, although the indeepndent may have a higher salary ingredient to be computed into the total cost of the service rendered, the other cost factors comprising the independent's actual fee may in fact be less than the non-salary cost factors charged by the provider which has in-house therapists. The total cost of services by the independent may therefore be less.

Under the statute we review, the provider with in-house

employees can continue to charge a reasonable fee and include therein even a profit factor if this is deemed "reasonable" for the particular provider. The independents, however, may only receive fees based upon the salary equivalency ceiling plus operating expenses. Since I can find no basis, on the factual posture in which this case now stands, for an inference that the services of independents are inferior, more expensive, undesirable or unnecessary, I cannot identify the rational basis upon which Congress has acted to treat plaintiffs differently from their cousins, providers with in-house therapy employees.

There are also averments of independents in the record which indicate that the effect of the challenged legislative scheme would be to drive most if not all independents from the medicare services arena. Again, in the posture in which this case reaches us, it is difficult to determine whether such doomsaying has merit or not. The intent of Congress in enacting the salary equivalency provision would appear to be the placing of a limitation upon those fees of independents which are reimbursable. I would think that if the effect of the legislation would be as the plaintiffs allege, it would not be rationally related to the Congressional goal of continuing to provide medicare coverage for the services of independents, albeit with a fee ceiling imposed.

Upon a consideration of the statute, the regulations, the memoranda and the affidavits, I am of the opinion that genuine issues of fact exist as to whether the statute is constitutional in its application to plantiffs. I would therefore deny defendants' motion to dismiss and the cross-motions for summary judgment.

ROBERT M. DUNCAN
Judge United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

B. V. CLEMONS, L.P.T., et al. :
Plaintiffs :
vs. Civil Action 73-530
UNITED STATES OF AMERICA, et al. :
Defendants :

ORDER

For the reasons and on the grounds which more fully appear in the Opinion of this Court filed simultaneously herewith, it is concluded that the claims for relief set forth in the amended complaint are not meritorious and that plaintiffs are not entitled to the declaratory and injunctive relief requested in the amended complaint.

IT IS ORDERED THAT the complaint be, and it hereby is, DISMISSED.

BY ORDER OR THE COURT

JOHN W. PECK
Judge, United States Court of Appeals for the Sixth Circuit

JOSEPH P. KINNEARY
Chief Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

B. V. CLEMONS, L.P.T., et al.
Plaintiffs : Civil Action 73-530
vs.
UNITED STATES OF AMERICA, et al.
Defendants :

JUDGMENT

This action came on before the Court, the Honorable John W. Peck, Judge, United States Court of Appeals for the Sixth Circuit, the Honorable Joseph P. Kinneary, Chief Judge, United States District Court and the Honorable Robert M. Duncan, United States District Judge;

Now therefore, in accordance with the majority opinion and the order entered March 26, 1975, IT IS ORDERED AND ADJUDGED THAT the complaint be, and it hereby is, DISMISSED.

JOHN D. LYTER
Clerk

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

B. V. CLEMONS, L.P.T., et al.,
Plaintiffs,
vs. Civil Action 73-530
UNITED STATES OF AMERICA, et al.,
Defendants.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that B. V. Clemons, Vincent H. King, James Hayden, Joe Scott, Louis Cotousky, Robert E. Strzelcyk, Harry D. Thorp, Patrick L. Therriault, Roline D. Swanson, Clifford J. Wedel, Jerry L. Bryant and F. L. Fabrizio, the plaintiffs above named, hereby appeal to the Supreme Court of the United States from the final judgment and order dismissing the Complaint, entered in this action on March 26, 1975.

This appeal is taken pursuant to 28 U.S.C. §1253.

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APPENDIX B

Amendment V

"No person shall . . . be deprived of life, liberty, or property, without due process of law . . ."

This reproduces a pertinent part of a section of the Medicare Act as amended in 1972 and codified in the United States Code:

Section 1801 of the Medicare Act (42 U.S.C. §1395) reads in pertinent parts as follows:

"Nothing in this subchapter shall be construed to authorize any Federal officer or employee to exercise any supervision or control over the practice of medicine or the manner in which medical services are provided, or over the selection, tenure, or compensation of any officer or employee of any institution, agency, or person providing health services; or to exercise any supervision or control over the administration or operation of any such institution, agency, or person."

This reproduces pertinent parts of the Ohio Revised Code with respect to physical therapy licensure and corporate practice of professions:

Section 1701.03 provides in pertinent part:

"A corporation may be formed for any purpose or purposes, other than for carrying on the practice of any profession . . ."

Section 1785.01 (A) provides in pertinent part:

"Professional service means any type of professional service which may be performed only pursuant to a license, certificate, or other legal authorization as provided by Chapters . . . 4731 of the Revised Code to . . . physicians and surgeons, and practitioners of limited branches of medicine . . ."

Section 1785.01 (B) provides in pertinent part:

"Professional association means an association organized under Section 1785.01 to 1785.08 inclusive of the Ohio Revised Code for the sole purpose of rendering one of the professional services authorized under Chapters . . . 4731 . . . of the Revised Code."

Section 1785.03 provides in pertinent part:

"A professional association may render professional service only through officers, employees, and agents who are themselves duly licensed or otherwise legally authorized to render professional service within this state."

Section 4731.70 (A) provides in pertinent part:

"The state medical board may refuse to grant a license to an applicant for a license to practice physical therapy or may suspend or revoke the license of any physical therapist licensed by it, for any of the following reasons:

(a) Applying or offering to apply physical therapy independent of the prescription and direction of a person licensed in this state to practice medicine and surgery . . ."

Section 4731.73 (A) provides in pertinent part:

"(A) No person shall practice nor in any way hold himself out as being able to practice physical therapy in this state unless duly licensed in accordance with the provisions of Section 4731.62 and 4731.72, inclusive of the Ohio Revised Code."